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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CRIMINAL JURISDICTION

CRIMINAL APPEAL NO.802 OF 1998
ALONG WITH
CRIMINAL APPEAL NO.840 OF 1998
AND
CRIMINAL APPEAL NO.871 OF 1998

CRIMINAL APPEAL NO.802 OF 1998

1) Akbar Ali Patel)
Age 38 years, Occ.: Service)
R/o.Jaykar Wadi, Barkatali Marg)
Wadala, Mumbai.)

2) Salim Bashir Shaikh)
Age 28 years, Occ.: Rickshaw Driver)
2581, Jogwada, Nasik.)
(At present in custody).. APPELLANTS

VERSUS

State of Maharashtra)
(At the instance of the Inspector)
of Police, Antop Hill Police Station)
Mumbai)).. RESPONDENT

Mr.S.V. Marwadi for the Appellants.

Mr.P.S. Hingorani, Additional Public Prosecutor,
for the Respondent.

WITH

CRIMINAL APPEAL NO.840 OF 1998

Shyam @ Bhurya Nana Ahire).. APPELLANT

VERSUS

State of Maharashtra
(Inspector of Police, Antop Hill)
Police Station, Mumbai)).. RESPONDENT

Mr.K.S. Patil for the Appellant.

Mr.P.S. Hingorani, Additional Public Prosecutor,
for the Respondent.

AND

CRIMINAL APPEAL NO.871 OF 1998

Ahmed Yasin Sayyed)
Age - Adult,)
R/o. S.No.56, R.No.13/N/161)
Jaikarwadi, Barkat Ali Darga Hill)
Wadala East, Mumbai 37.).. APPELLANT

VERSUS

The State of Maharashtra).. RESPONDENT

Mr.Nitin Pradhan with Ms.S.D.Khot for the Appellant.

Mr.P.S. Hingorani, Additional Public Prosecutor,
for the Respondent.

CORAM: V.G. PALSHIKAR AND
SMT. NISHITA MHATRE, JJ.

DATED: 10TH OCTOBER 2006

JUDGMENT : (PER SMT.MHATRE, J.)

. These three Appeals filed by the accused-Appellants arise out of the same incident which led to their conviction and sentence under Section 302 of the Indian Penal Code. The prosecution has charged them with committing a murder of one Ravindra on 28th February 1991. Appeal No.871 of 1998 has been filed by accused No.1. Appeal No.840 of 1998 has been filed by accused No.2 and Appeal No.802 of 1998 has been filed by accused Nos.3 and 4. Accused No.5 has been acquitted.

2. The allegation of the prosecution is that the accused had assembled with weapons behind Laxmi Hotel, Wadala with a common object for rioting and to assault and murder Ravindra. They were a part of an unlawful

assembly and had used force. The accused were thus charged under Sections 143, 147, 148, 149 and 302 of the Indian Penal Code. In the alternative, they were charged for having committed an offence punishable under Section 302 r.w. 34.

3. By the impugned judgment, accused Nos.1 to 4 were acquitted under Section 143, 147 and 148, 302 r.w. 149 of the Indian Penal Code. Accused No.5 was acquitted of all the charges.

4. The prosecution has examined ten witnesses. PW1 is the eye witness to the incident. She is the sister of the deceased. She had described the incident which occurred on 28th February 1991 in the morning. She states that she saw five persons armed with weapons assault Ravindra. According to this witness, accused Nos.1 and 2, who were named, were armed with choppers. Accused No.1 struck the victim a blow on the back of the head. Accused No.2 assaulted the victim on the waist with the chopper. Accused No.5, according to this witness, was also holding a chopper and was assaulting the deceased on his legs. The role that this witness attributes to accused No.3-Akbar and accused No.4-Salim is that they had assaulted the deceased with stones. She heard the shouts of her brother Ravindra while he was being assaulted. She proceeded in the direction

where the cries came from and saw the assailants violently attacking the deceased. This witness has stated that on seeing the assault, she shouted out to her mother that Ravindra was being assaulted. Her other brother, his wife and her mother came to the spot. Her sister Leela also arrived at the spot. Seeing the entire family, the accused left from the scene of offence taking with them their weapons of assault. The witness then states that she with her brother, mother and sister Leela lifted Ravindra into the taxi and took him to Sion Hospital. On the way to the Sion Hospital, the deceased was bleeding profusely from the injuries sustained by him. This witness states that her sister Leela asked the deceased as to how the assault had occurred. The deceased named Ahmed, Shyam @ Bhurya, Akbar and Salim and an unknown person. According to this witness, the motive for the assault was that about one and half months prior to the incident the deceased had objected to the accused concealing some weapons on the roof of a shop run by him. A quarrel had ensued between Ahmed and Ravindra. The accused had threatened the deceased with dire consequences. This witness in her cross-examination has admitted that though she knew the first names of accused Nos.1 and 2, she did not know their full names. The witness has then stated that she saw the entire incident when she was standing behind their house. The witness has stated that she had

informed the investigating officer that five persons had assaulted Ravindra and that she had named them and the roles that they played in the assault. She has stated

that she was not aware as to why these facts were not mentioned in her earlier statement. The witness has acceded that she gave a supplementary statement as well. She was not called to identify any of the accused. This witness has been extensively cross-examined and what emerges from the testimony of this witness is that the identity of the assailants is not free of doubt. The witness was not required to identify the accused by attending a test identification parade but she has identified the accused in the Court. Admittedly, she knew only the first names of the accused. These names are far from uncommon and, therefore, the identity of the accused is in doubt.

5. The next witness examined by the prosecution is Leela PW2. This sister of the deceased reached the spot where the deceased was being assaulted when she heard PW1 shout. She saw the accused running away from the spot with weapons in their hands. She has stated that she knew accused Nos.1 to 4 by name. She has then spoken about the fact that the deceased disclosed to her the names of the accused as the persons who had assaulted him. The deceased also had informed her of one more unknown person who was an assailant. Again,

the evidence of this witness does not establish the identity of the assailants.

6. PW3 is the panch witness. He has proved the panchanama as it bears his signature. However, he has stated that he did not remember whether the panchanama was drawn in his presence.

7. The next witness examined for the prosecution is the Special Executive Magistrate who recorded the dying declaration of the victim. This dying declaration is at Exhibit 21 and the witness has proved it. He states that he recorded the declaration after obtaining the consent of the Medical Officer. However, there is no endorsement of the Medical Officer on this dying declaration. All the necessary precautions which are required to be adopted while recording a dying declaration have not been adhered to by this witness. Therefore, the dying declaration in such circumstances cannot be accepted. The spot panchanama has been proved by PW5. PW6 is the panch witness to the recovery of the weapon of accused No.5. This accused has been acquitted and, therefore, the deposition of this witness is not relevant for the purposes of these Appeals. PW7 is the Doctor who has conducted the post mortem. He has stated that all the injuries sustained by the deceased were due to sharp edged weapons. If the doctor’s testimony is

accepted than the role attributed to Accused No.3 and accused No.4 by PW 1 and 2 is unsustainable as according to these witnesses they had injured the deaceased with stones, which in our opinion cannot be considered as sharp edged weapons.

8. The next witness is the panch witness to the recovery of the weapons from accused Nos.1 and 2. He has spoken about the chopper being recovered at the instance of accused No.2. This chopper was recovered from under the garbage which was scattered next to the bungalow on top of a hill. For recovery of the weapon used by accused No.1, he took the panchas and the police personnel towards a dilapidated house where nobody was residing. The chopper recovered was found lying beside the door.

9. PW9 and PW10 are the investigating officers. These witnesses have been cross-examined in great detail regarding the omissions contained in the statements made by PW1 and PW2. PW9 has categorically stated that PW1 and PW2 did not make the assertions that they have made before the Court when he recorded their statements.

10. On the basis of this evidence led before the trial Court, we will now consider the submissions made on behalf of accused Nos.2, 3 and 4. The learned

Counsel submits that accused Nos.3 and 4 cannot be involved in the assault though PW1 and PW2 have named them, they have stated that Accused Nos. 3 and 4 had assaulted the deceased with stones. Despite this, the post mortem report indicates that there were no injuries caused by stones. It is further submitted that the prosecution has not established the motive on the part

of accused Nos.3 and 4 for committing the crime. It is also submitted that there was no recovery or seizure of the stones used for assaulting the victim. As regards the recovery of the chopper at the instance of accused No.2, the learned advocate submits that it should be disbelieved since it was made from a place which was accessible to all. The learned advocate urges that the identity of the accused has not been established beyond doubt. He then points out that the prosecution has not proved the motive for the assault, and hence the conviction cannot be sustained.

11. In our opinion, these submissions must be accepted. FIR recorded shows that the names given by the complainant are vague and since the names of the accused are common, it is quite probable that this is a case of mistaken identity. None of the witnesses have correctly identified the accused prior to the trial. No identification parade was held. It is, therefore, difficult to believe that the accused who had first

names which were very common were in fact involved in the assault. Besides this, as noticed earlier, the role attributed to accused Nos.3 and 4 is that they stoned the deceased. However, the medical reports show that there is no injury caused by stones nor have any stones been recovered from the spot.

12. As regards accused No.1, the learned Counsel

appearing for him supports the submissions made by the learned Counsel for accused Nos.2, 3 and 4 regarding the identity of the accused. He points out that PW1 had stated that accused No.1 had given a blow with a chopper on the back of the head of the deceased. However, such a statement has not been made when the police recorded her statement. The Investigating Officer PW9 has categorically stated that PW1 had not informed him that the deceased was given a blow with a chopper at the back of the head by accused No.1. As regards the identity of the accused, this witness PW9 has stated that PW2 had not informed the police that she had questioned the deceased as to who had assaulted him. She had also not stated that there were weapons which the accused had used and that they were stained with blood. The witness has also conceded that PW2 did not name Salim i.e. accused No.4 nor did PW1 and PW2 name accused No.4.

13. In such circumstances, where the witnesses for

the prosecution do not corroborate each other, it is difficult to convict the accused. There is a lack of evidence which unerringly points to the guilt of the accused. The submission of the learned Additional Public Prosecutor is that the ocular testimony is corroborated by the medical evidence on record and, therefore, the case of the prosecution should be accepted. However, when the identity of the accused has not been established, we are afraid that the submission

of the learned Additional Public Prosecutor cannot be accepted.

14. In such circumstances, because of the complete lack of evidence, the conviction against the accused is unsustainable. Appeals allowed. The accused are acquitted. They shall be released forthwith, if not otherwise required in law.